

## Access to Counsel

Access to counsel is a hallmark of our democracy. Unfortunately, many noncitizens now are being denied this access at our nation's ports of entry and in our country's interior. The government's immigration policies have changed rapidly and dramatically since 9/11, triggering serious concerns about the infringement of immigrants' fundamental rights. Indeed, the Department of Justice (DOJ) Inspector General's report on immigrant detentions after 9/11 provides a scathing critique of immigration enforcement and detention practices, outlining a handful of clear constitutional violations. The migration of the government's immigration functions (except for the immigration court system) from DOJ to the Department of Homeland Security (DHS) has only exacerbated concerns about denial of access to representation.

In the post-9/11 environment, the need for a meaningful and enforceable right to legal representation has assumed new importance. Immigrants often lack the language skills and the necessary understanding of our legal processes to adequately present their cases, protect their interests, and preserve their rights. Immigration officers have the power to make decisions that can fundamentally alter a person's life. Decisions to remove or deny entry to individuals can tear families apart, deprive people of their livelihood, or return them to situations where they face persecution.

Not only can counsel help individuals assert their claims and protect their interests, counsel also plays an important role in facilitating and streamlining immigration adjudications. Counsel's participation promotes efficiency, encourages correct decision making, and facilitates the effective use of resources. The assistance of counsel enhances immigration officers' ability to quickly distill and address the core legal issues. Expedient decision-making in ordinary cases enables officers to focus attention on more problematic cases, an important benefit in the post-9/11 world.

### Representation in Immigration Matters Adjudicated at Ports of Entry

**The Issue:** The Administrative Procedure Act (APA) mandates that a person compelled to appear before a federal agency is entitled to be represented by counsel or a qualified representative. The provision states:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. (5 U.S.C. §555(b))

Despite the APA's assertion of a right to representation by counsel, a proviso posted to the Federal Register in 1980 maintains that this right is superfluous at primary or secondary inspections because individuals will have access to counsel in subsequent administrative proceedings. The Federal Register notice announcing this regulation states:

The right of representation does not apply to a person who is being processed through primary or secondary inspection at a port of entry. . . . While the inspector has authority to admit an applicant for entry, he is not authorized to finally bar the alien. . . . Subsequent administrative proceedings will determine whether or not an alien is admissible or excludable and it is at this point that the alien has the right to representation. (45 Fed Reg. 81732 (Dec. 12, 1980))

Since 1980, the Immigration and Naturalization Service (the functions of which have now migrated to the Department of Homeland Security (DHS)) has maintained that individuals applying for entry to the U.S. have no right to counsel at the border unless taken into custody as the focus of a criminal investigation. The INS based this position on its view that the ultimate power to determine whether someone is admissible or excludable rests in the administrative hearings that take place subsequent to an inspection at the border.

However, the expedited removal provision in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) eliminates all avenues for administrative or judicial review for many applicants for admission. (The “expedited removal” provision is a mechanism for turning away arriving aliens who the government alleges have made a material misrepresentation during the entry process or who lack the required documentation for entry.) Using this draconian procedure, an inspections officer can bar a person from entering the United States for five years or life, depending upon the particular ground(s) alleged in the case. The inspections officer prepares the order of expedited removal, which is subject only to review by a supervisor, who must concur with the decision for the removal to be effective. There are *no* avenues of administrative or judicial review available to challenge orders of expedited removal.

Asylum seekers, business persons, relatives of U.S. citizens, and other legal U.S. residents routinely are denied access to legal counsel in immigration-related matters at our nation’s ports of entry. Significantly, the government has not limited access to counsel in other border-related inspections. For example, there are no bars to representation in customs-related matters at the border. Attorneys and customs brokers (representatives authorized by regulation in customs-related matters) frequently provide valuable on-site assistance in clearing goods at the border, a reality that is readily acknowledged (and appreciated) by government officials. Thus, current border practices allow forty-foot freight containers to have expert representation regarding their entrance to this nation, while asylum seekers, business persons, and other visitors are denied such assistance when confronted with equally complex situations.

**AILA’s Position:** Access to counsel at the border can help guarantee that the government’s broad powers to admit or bar noncitizens from entry are not used improperly or arbitrarily. The denial of access to counsel in situations where persons may be barred forever from the United States without appeal clearly violates the APA and contravenes fundamental due process principles. Given the expansive application of expedited removal procedures at the border and ports of entry, this denial of access to counsel is now ubiquitous and the government’s rationale for this policy (representation will be permitted at “subsequent administrative hearings”) is no longer supportable. The government has failed to offer any reasons for continuing to deny access to counsel.

**Current Legislation:** AILA believes that Congress should pass legislation affirming that the APA’s guarantee of access to counsel applies to immigration matters at the border. Unfortunately, the only significant pending legislation (H.R. 4437 and S. 2611) moves in the opposite direction by further expanding expedited removal and increasing the number of arriving immigrants who are denied access to counsel.

### **Representation in Immigration Matters in the Interior since 9/11**

**The Issue:** Actions taken by DOJ and DHS officials after 9/11 evince an agency mind-set that the right to counsel is somehow discretionary and subsidiary to other agency prerogatives. In addition, the Attorney General and the Secretary of the Department of Homeland Security unilaterally expanded expedited removal to individuals in our country’s interior.

As reported in the June 2, 2003, DOJ Inspector General’s Report, in the wake of 9/11, many foreign nationals were detained without charges for extended periods of time and were prevented from having

any meaningful contact with legal counsel. Denial of access amounts to denial of counsel. Furthermore, numerous reports from attorneys representing individuals subject to the NSEERS call-in registration program indicate that their clients were frequently denied access to counsel during interviews and questioning. These reports were reinforced by a spokesman for the INS, Bill Strassberger, who indicated that the INS did not believe that immigrants possess a right to counsel during the booking process, *even if questioning takes place during that process.*

In November 2002, the Attorney General expanded application of the expedited removal procedures to any alien who arrives in the U.S. by sea, without inspection, and who has not been physically present in the U.S. for at least two continuous years prior to the determination of inadmissibility. That expansion marked the first time that the government had pursued a policy preventing individuals already here in the U.S. from obtaining legal representation during removal proceedings. This expansion of expedited removal (and the corresponding contraction of access to counsel) has since continued: in August 2004, DHS announced a pilot project authorizing expedited removal for non-Mexican nationals found within 100 miles of the border who cannot demonstrate that they have been in the U.S. for at least 14 days. In January 2006, DHS expanded expedited removal to all U.S. coastal areas and the U.S.-Canadian border. Most recently, in May 2006, DHS expanded expedited removal further to cover families apprehended in areas along the southern, northern, and coastal borders.

The right to counsel has been recognized for individuals placed in removal proceedings after entering the U.S. Indeed, a right to counsel for immigrants in removal proceedings is protected by federal regulation, statute, and the Constitution. Section 292 of the Immigration and Nationality Act (INA) explicitly provides that a right to counsel (at no expense to the government) exists during removal proceedings before an immigration judge.

This right has been difficult to enforce in the post-9/11 era because the government largely has adopted the attitude that foreign nationals with immigration problems should be treated like terrorists. The Supreme Court has established the clear principle that constitutional due process applies to all “persons” in this country, including noncitizens. The government’s efforts to impede and circumvent foreign nationals’ access to legal counsel are tantamount to an assault on that principle.

**AILA’s Position:** The right to legal representation for noncitizens facing removal from the interior of this country is well established. Moreover, as a practical matter, in these times of rapidly changing immigration policy, attorneys with expertise in the field are indispensable to ensure the protection of immigrants’ substantive and procedural rights. Expansion of expedited removal proceedings to individuals already here in the U.S. moves us in precisely the wrong direction by circumventing the right to representation. Likewise, actions by immigration authorities that materially interfere with access to counsel diminish and devalue the right, increasing the likelihood that the right will be further degraded going forward.

**Current Legislation:** AILA believes that Congress should move to strengthen the right to counsel by prohibiting expedited removal of noncitizens already present in the interior. Congress also should make intentional agency denials of access to counsel an actionable offense. Currently, there is no significant pending legislation to this effect.